

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

JAN 13 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Appellee,)	2 CA-CR 2010-0371
)	DEPARTMENT B
v.)	
)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
WILLIAM JOEL VASQUEZ,)	Rule 111, Rules of
)	the Supreme Court
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20090588002

Honorable Richard D. Nichols, Judge
Honorable Michael O. Miller, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Diane Leigh Hunt

Tucson
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender
By Scott A. Martin

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V Á S Q U E Z, Presiding Judge.

¶1 Appellant William Vasquez was convicted after a jury trial of two counts of armed robbery and two counts of aggravated robbery. Pursuant to a plea agreement, he pled guilty to a severed charge of possession of a deadly weapon by a prohibited possessor.¹ The trial court sentenced him to concurrent, presumptive terms of imprisonment for the robbery convictions, the longest of which was 10.5 years, followed by a three-year term of probation for the prohibited-possessor conviction. On appeal, Vasquez, a juvenile at the time he committed the offenses, argues the automatic-transfer provision of A.R.S. § 13-501(A) is unconstitutional because it violates his due process rights under the Fourteenth Amendment and the Eighth Amendment’s prohibition against cruel and unusual punishment. For the reasons stated below, we affirm.

Factual and Procedural Background

¶2 We view the facts and all reasonable inferences therefrom in the light most favorable to upholding the convictions. *State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999). The charges arose from a carjacking Vasquez committed in February 2009. Around 8:00 p.m., B.D. was standing outside his car at a car wash while his wife, C.D., and their four-year-old son sat inside the car. Vasquez and Carlos Nunez approached B.D., “screaming” at him to give them his car. When B.D. resisted, Nunez pulled out a gun and fired it at him. C.D. then got out of the vehicle as B.D. grabbed

¹We address only Vasquez’s challenge to his robbery convictions and not the prohibited-possessor conviction which resulted from his guilty plea. *See State v. Flores*, 218 Ariz. 407, ¶ 6, 188 P.3d 706, 708-09 (App. 2008) (plea waives all non-jurisdictional defects, including deprivations of constitutional rights).

their son from the backseat, and the three fled to a nearby drug store. Vasquez and Nunez drove away in the car and later abandoned it in traffic.

¶3 Although Vasquez was fifteen years old at the time of the offenses, he was prosecuted as an adult pursuant to § 13-501(A). He was indicted on two counts of armed robbery, two counts of aggravated robbery, three counts of aggravated assault, and one count of possession of a deadly weapon by a prohibited possessor.² Vasquez joined in Nunez's motion to remand the charges to the juvenile court, arguing the automatic-transfer provision of § 13-501(A) violates due process and the prohibition against cruel and unusual punishment under the state and federal constitutions.³ The trial court denied the motion, but granted Vasquez's motions to sever his trial from Nunez's and to sever the prohibited-possessor charge from the robbery and assault charges.

¶4 The jury acquitted Vasquez of the assault charges but found him guilty of the robbery offenses. He was sentenced as described above, and this appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21 and 13-4033.

Discussion

¶5 Vasquez argues § 13-501(A) is unconstitutional because the automatic transfer of a juvenile's case to adult court violates his right to due process under the

²Before trial, the court granted Vasquez's motion to sever the aggravated assault charge relating to the child victim. The court later dismissed that charge on the state's oral motion after the jury rendered its verdicts.

³Vasquez has failed to develop an argument in his opening brief that the statute violates Arizona's constitution. We therefore deem that issue waived. *State v. Cons*, 208 Ariz. 409, ¶ 18, 94 P.3d 609, 616 (App. 2004) (failure to develop argument in opening brief results in waiver of issue on appeal).

Fourteenth Amendment and the Eighth Amendment’s prohibition against cruel and unusual punishment. Section 13-501(A) provides that “[t]he county attorney shall bring a criminal prosecution against a juvenile in the same manner as an adult if the juvenile is fifteen, sixteen or seventeen years of age at the time the alleged offense is committed and the juvenile is accused of” certain enumerated offenses, including armed robbery.

¶6 We review a statute’s constitutionality de novo. *State v. Brown*, 207 Ariz. 231, ¶ 7, 85 P.3d 109, 112 (App. 2004). In conducting that review, we begin with the presumption that the statute is constitutional, and the party challenging the validity of the statute has the burden of overcoming that strong presumption. *State v. Stauffer*, 203 Ariz. 551, ¶ 16, 58 P.3d 33, 38 (App. 2002). In interpreting the statute, we are mindful that we have a duty “‘to give effect to the legislature’s intent’ and when the ‘statute’s language is plain and unambiguous, we look no further.’” *State v. Miller*, 226 Ariz. 190, ¶ 12, 245 P.3d 454, 456 (App. 2011), *quoting State v. Hinden*, 224 Ariz. 508, ¶ 9, 233 P.3d 621, 623 (App. 2010).

Due Process

¶7 Vasquez first claims the automatic transfer of a juvenile’s case to adult court without “individualized factfinding” or giving him an opportunity to be heard violates his substantive and procedural due process rights. The Fourteenth Amendment prohibits states from “depriv[ing] any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1. The threshold requirement for any substantive or procedural due process claim is a showing of a life, liberty, or property interest protected by the constitution. *Aegis of Ariz., L.L.C. v. Town of Marana*, 206 Ariz.

557, ¶ 44, 81 P.3d 1016, 1027 (App. 2003); *see also Banks v. Ariz. State Bd. of Pardons & Paroles*, 129 Ariz. 199, 200, 629 P.2d 1035, 1036 (App. 1981) (describing when a protectable interest exists).

¶8 Vasquez argues he has a “substantive constitutional right to punishment in accordance with his culpability as a juvenile.” To the extent he argues this encompasses a constitutional right to be adjudicated as a juvenile, this court rejected that argument in *Andrews v. Willrich*, 200 Ariz. 533, 29 P.3d 880 (App. 2001). Although Vasquez acknowledges *Andrews*, he contends it is not dispositive, arguing the court resolved the issue before it based on principles of procedural due process, not substantive due process.

¶9 In *Andrews*, the two juvenile defendants challenged the constitutionality of § 13-501(B) on state and federal due process grounds, claiming the statute does not provide for notice and an opportunity to be heard before the state prosecutes a “qualified juvenile offender as an adult.”⁴ 200 Ariz. 533, ¶ 22, 29 P.3d at 885. But the court held “due process does not require that a juvenile offender be afforded notice and an opportunity to be heard” before being tried as an adult. *Id.* ¶ 23, 29 P.3d at 886. The court also stated that “[d]ue process requires a meaningful opportunity to be heard only when a person may be deprived of life, liberty, or property.” *Id.* ¶ 23, 29 P.3d at 885. It noted that the defendants had failed to “identify any liberty interest that may be deprived” by being prosecuted as an adult and stated that “juvenile offenders do not possess rights to be adjudicated in juvenile court.” *Id.* ¶ 23, 29 P.3d at 886, *citing* Ariz. Const. art. IV,

⁴Under § 13-501(B), the county attorney has discretion to prosecute juveniles as adults if they are at least fourteen years of age at the time of offense and are accused of certain felony offenses.

pt. 2, § 22; *see also In re Maricopa Cnty. Juv. Action No. J-93117*, 134 Ariz. 105, 109, 654 P.2d 39, 43 (App. 1982) (“[A] juvenile has no right to avoid adult prosecution solely because he is less than 18 years of age.”).

¶10 Vasquez also recognizes that courts in other jurisdictions have uniformly upheld the constitutionality of statutes authorizing the automatic transfer of juvenile offenders charged with certain felonies. *See, e.g., Woodward v. Wainwright*, 556 F.2d 781, 785-86 (5th Cir. 1977); *State v. Angel*, 715 A.2d 652, 667 (Conn. 1998); *State v. Behl*, 564 N.W.2d 560, 566-67 (Minn. 1997). He argues, however, that the “constitutional landscape regarding juvenile culpability in the criminal arena has recently changed dramatically” in light of the Supreme Court’s opinions in *Roper v. Simmons*, 543 U.S. 551 (2005), and *Graham v. Florida*, ___ U.S. ___, 130 S. Ct. 2011 (2010). His reliance on these cases is misplaced.

¶11 In *Roper*, the Court categorically excluded defendants under eighteen years of age from receiving the death penalty, 543 U.S. at 578, and in *Graham*, it prohibited life-without-parole sentences for juvenile-nonhomicide offenders, ___ U.S. at ___, 130 S. Ct. at 2034. Although in both cases the Court recognized the inherently less culpable nature of juvenile offenders compared with adults, neither case suggests a juvenile offender has a constitutional right to have his or her case adjudicated in the juvenile justice system. We therefore conclude § 13-501(A) does not violate federal due process principles.

Cruel and Unusual Punishment

¶12 Vasquez next argues § 13-501(A) violates the Eighth Amendment’s protection against cruel and unusual punishment. But the Eighth Amendment limits the kinds of punishment that can be imposed on criminal defendants *after* conviction. *See Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977); *see also Powell v. Texas*, 392 U.S. 514, 531-32 (1968) (plurality opinion). It not only includes punishments that have historically been considered barbaric, but also sentences that are grossly disproportionate to the crime committed. *Solem v. Helm*, 463 U.S. 277, 284 (1983). Therefore, to the extent Vasquez is arguing the automatic-transfer provision of § 13-501(A) renders the statute unconstitutional because the transfer itself is cruel and unusual punishment, we disagree. Although being tried as an adult exposes the juvenile offender to the risk of more severe punishment than being adjudicated in the juvenile system, the transfer itself is not a form of punishment for purposes of the Eighth Amendment. Thus, the Eighth Amendment’s protection against cruel and unusual punishment is simply not implicated by the transfer itself.

¶13 As he does with his due process argument, Vasquez contends nevertheless that *Roper* and *Graham* “demonstrate an evolution in [Eighth] Amendment constitutional analysis recognizing the need to treat juveniles differently from adults.” We agree with Vasquez, as we noted above, that *Roper* and *Graham* recognize juvenile offenders “have lessened culpability” compared to adults because they “‘lack [the same] maturity and [have] an underdeveloped sense of responsibility.’” *Graham*, ___ U.S. at ___, 130 S. Ct. at 2026, *quoting Roper*, 543 U.S. at 569-70. But *Roper* and *Graham* address sentencing-

upon-conviction issues. Neither stands for the proposition that the mere transfer of a juvenile for prosecution as an adult under specified circumstances is, in and of itself, a form of punishment that violates the Eighth Amendment's prohibition against cruel and unusual punishment.

¶14 Vasquez also argues the sentences he received for his convictions in adult court are disproportionate to those he would have received in juvenile court. However, under the Eighth Amendment's gross-disproportionality analysis, we do not compare sentences that may be imposed upon a conviction in adult court with the dispositions that may be ordered in juvenile court. *See Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991) (Kennedy, J., concurring) (disproportionality analysis begins with comparing gravity of offense and severity of sentence). Vasquez has failed to establish that his sentences constitute cruel and unusual punishment under the Eighth Amendment.

Disposition

¶15 For the foregoing reasons, Vasquez's convictions and sentences are affirmed.

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Judge